



# Commonwealth of Massachusetts

## State Ethics Commission

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### CONFLICT OF INTEREST OPINION EC-COI-92-36\*

#### FACTS:

You are Yarmouth town counsel. You have requested this advisory opinion on behalf of an alternate member<sup>1/</sup> of the Yarmouth Board of Appeals (the Board). The Board is composed of five regular members, each of whom is appointed for a five year term, as provided for in G.L. c. 40A and Town of Yarmouth by-law §102.1. In addition, ten alternate members are appointed for one year terms under §102.1. Alternate Board members sit on occasion, by designation of the chairman, whenever a regular member is unavailable because of absence or conflict of interest. You inform us that the town has no specific by-law or charter provision which otherwise describes or defines the duties of alternate Board members. You state, however, that alternate members are rarely called upon to fill in for regular Board members and do not otherwise participate in Board meetings.

The alternate Board member in question has served in that position for the past several years and is scheduled for re-appointment. He is also a trustee of a realty trust (which was organized as a Massachusetts business trust with transferable shares). In the past, he has appeared before the Board as a representative of the trust. It is possible that the trust may need to petition the Board again in the future. Finally, you inform us that members and alternate members of the Board have been designated as special municipal employees by the Board of Selectmen.

#### QUESTION:

May an alternate Board member, who has been designated as a special municipal employee, represent his trust before town boards if he does not officially participate in the matter?

#### ANSWER:

Yes, subject to the conditions described below.

#### DISCUSSION:

Section 17(a) of c. 268A, the Massachusetts conflict of interest statute, provides that no municipal employee (including a Selectman) shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the city or town or municipal agency in relation to any particular matter<sup>2/</sup> in which the same city or town is a party or has a direct and substantial interest.

Section 17(c) of c. 268A provides that no municipal employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone (including a trust)<sup>3/</sup> other than the city or town or municipal agency in prosecuting any claim against the same city or town, or as agent or attorney for anyone in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.

Together, these sub-sections of c. 268A are designed to prohibit divided loyalties. In other words, a municipal employee is a municipal employee first and foremost, and owes a duty of loyalty to the municipality. Consequently, §17 is designed to prohibit an individual from splitting his loyalties between a municipal job and a private interest. See *EC-COI-92-10*; *92-4* (discussing state counterpart provision, §4); see also *EC-COI-92-1*; *90-12*; *90-16*.

Whenever a person is both a private and a public employee, "[t]he appearance of potential impropriety is raised - influence peddling, favoring his private connections, and cheating the government. Whether or not any or

all of these evils result, confidence in government is undermined because the public cannot be sure that they will not result.” Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B. U. L. Rev. 299, 322 (1965). Section 17(a) reflects the maxim that “a man cannot serve two masters.” It seeks to preclude circumstances leading to a conflict of loyalties by a public employee. As such, it does not require a showing of any attempt to influence - by action or inaction - official decisions. What is required is merely a showing of an economic benefit received by the employee for services rendered or to be rendered to the private interests when his sole loyalty should be to the public interest. *Commonwealth v. Canon*, 373 Mass. 494, 504 (1977) (dissent).

Consequently, a municipal employee may not represent a third party in connection with a particular matter if the town (not just the municipal employee’s agency) is either a party to, or has a direct and substantial interest in, that matter.

The prohibitions of §17 are, however, somewhat alleviated in the case of a special municipal employee.<sup>4/</sup> A special municipal employee may act as agent for, or receive compensation from, anyone other than his municipality in connection with a particular matter in which the municipality has a direct and substantial interest, *provided that* the particular matter is not one (a) in which *he* has at any time participated as a municipal employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving. Clause (c) applies only in the case of a special municipal employee who serves on more than sixty days during any period of three hundred and sixty-five consecutive days. With respect to alternate Board members for purposes of clause (c), we conclude that they “serve” only on those days on which they have been actually designated to sit on the Board. *Cf. EC-COI-91-5*; Buss, *supra*, at 340, n. 230 (the statute, §4 (state counterpart), provides “no answer more persuasive than the word ‘serves’ itself, which seems to suggest rendering service more than it does *availability* for services.”) (Emphasis added). Because alternate Board members serve for less than sixty days, they are not constrained by clause (c).

In the present case, whether an alternate Board member (who is also a special municipal employee) may represent a third party before town boards depends upon the answer to the following question. Is the alternate Board member acting as an agent in connection with a particular matter in which he has either participated as an alternate Board member or which was under his official responsibility? Before we can answer that question, however, we must briefly review the terms “participation” and “official responsibility” as they relate to Board members and alternate Board members.

### **Participation**

Whether a Board member has actually participated in a particular matter is relatively easy to determine. A Board member participates in any matter which is before him *if* he takes personal and substantial action with respect to that matter. For example, if the Board member discusses or votes on a given matter, he has participated in that matter. *See Graham v. McGrail*, 370 Mass. 133 (1976); *EC-COI-89-7* (participation in discussions are personal and substantial actions, not ministerial ones). This conclusion rests upon the definition of “participation” for purposes of c. 268A, §1(j).<sup>5/</sup> In order for action to be deemed participation, the action must be both personal and substantial.

Participation includes the approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise concerning a particular matter. *See EC-COI-89-7* (participation that is superfluous, non-determinative, or not part of the decision-making process is more likely deemed to be ministerial and, therefore, not personal and substantial). If a Board member abstains on a matter by choosing not to discuss and vote on it, he will not have participated in the matter. Similarly, if a Board member is absent from the only Board meeting at which a particular matter arises, for whatever reason, he will not have participated in the matter.

It follows, therefore, that an alternate Board member can participate in a given particular matter *only if* he was both called to fill in for a regular Board member, *and* he actually discussed or voted on the matter before him. Alternate Board members may not, therefore, represent third parties in connection with matters in which they have actually participated.

### **Official Responsibility**

The definition of official responsibility<sup>6/</sup> is somewhat broader, however. Official responsibility turns on the

authority to act, not whether that authority is, in fact, exercised. See *EC-COI-89-7; 84-48*; see also Buss, *supra*, at 321-322 (1965) (the general principle embodied in this definition is that public officials should not be permitted to step outside of their official roles to assist private entities or persons in their dealings with government), quoting Perkins, *The New Federal Conflict-of-Interest Law*, 76 Har. L. Rev. 1113 (1965). In *EC-COI-87-17*, this Commission held that the “keynote of official responsibility is the ‘potentiality’ of directing agency action and not the actual exercise of power.” That opinion concluded that matters are the subject of *potential* action only if the governmental employee had the ability to take action on the matter in question.

Thus, while a regular Board member may decline to participate in a matter before him (and thus eliminate the c. 268A restrictions which implicate participation), *EC-COI-87-37*, he or she can never forego “official responsibility” merely by inaction or absence. Regular Board members retain official responsibility for matters which are pending in the Board, whether or not they have actually worked on the matter and whether or not they actually sat on the Board on a given day. See, e.g., *EC-COI-89-7; 84-48*.

On the other hand, we find that the general rule applicable to regular Board members need not apply to alternate Board members given the limited nature of their status and responsibilities in Yarmouth as described by you. Yarmouth alternate Board members have no authority or *potential* ability to act on matters pending before the Board unless and until they are designated by the chairman to fill in for a regular Board member. See G.L. c. 40A, §12.<sup>7/</sup>

Further, it is clear from your facts that Yarmouth alternate Board members rarely, if ever, are called upon to serve. In effect, they constitute nothing more than a pool of qualified and willing volunteers to which the Board may turn in an emergency. They have no other duties or responsibilities and might not even attend Board meetings on a regular basis. Yarmouth alternate Board members do not have the *potential* of directing agency action, within the meaning of *EC-COI-87-17*, unless they are first designated to serve.<sup>8/</sup> (Where, however, a city’s or town’s alternate Board members are more frequently called upon to serve, we might conclude otherwise.)

Accordingly, based upon the present facts, because Yarmouth alternate Board members are not authorized to exercise any authority until they have been designated by the Board, we find that they do not have official responsibility for Board matters generally. *EC-COI-84-48* (official responsibility turns on the ability to act). Instead, we find that the alternate Board members’ official responsibility encompasses only those matters which were pending before the Board on the day or days on which they were designated to serve, even if they decline to serve once so designated.

Applying the above to your circumstances we find the following. The alternate Board member/special municipal employee may represent the trust before town boards provided that two circumstances are present: (i) he has not participated, as an alternate Board member on the matter (such participation would violate §19 of c. 268A as well as §17), and (ii) the matter did not come before him, anytime within the past year, on a day when he was filling in for a regular Board member even if he chose not to participate in it (that is, the matter was not under his official responsibility).<sup>9/</sup>

In the present case, the alternate member in question must exercise caution, however, so that no trust-related matters will come before the Board on days when he is called to fill in for a regular member. As illustrated above, although an alternate Board member may decline to participate in a matter by abstention, abstention will not eliminate official responsibility. Accordingly, the chairman (or the Board, by amending its rules under G.L. c. 40A, §12) may want to institute a policy which would prevent the alternate member’s service on the Board on a day when he might have to appear on behalf of the trust.

Finally, you should be aware of the restrictions of G.L. c. 268A, §23. Section 23(b)(2) prohibits other Board members (whether alternate or regular) from giving an unfair advantage to the alternate Board member if and when he comes before the Board representing the trust.<sup>10/</sup> The other Board members must use objective criteria when evaluating the alternate Board member’s matter and must leave aside any consideration of the alternate Board member’s status. See *EC-COI-91-3*.

In addition, §23(b)(3) prohibits the creation of the appearance of a conflict of interest.<sup>11/</sup> A public disclosure of all of the relevant facts would dispel the appearance of a conflict. Consequently, it is advisable for any Board members sitting on a day when their (alternate) colleague appears before them on a trust-related matter to file a letter with their appointing authority stating all of the relevant facts. The disclosure will dispel any appearance

that the Board may somehow act to the alternate Board member's undue advantage.

Finally, §23(c) prohibits the use of confidential (that is non-public) information to benefit a private interest.

**DATE AUTHORIZED:** November 5, 1992

\*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

<sup>1/</sup>Although the statute, G.L. c. 40A, refers to such members as "associate members," you have described them as "alternates." For reasons of consistency, we use the term alternate member throughout this opinion.

<sup>2/</sup>"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

<sup>3/</sup>See *EC-COI-84-117*; *In re Reynolds*, 1989 SEC 423.

<sup>4/</sup>"Special municipal employee," a municipal employee who is not a mayor, a member of the board of aldermen, a member of the city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a "special municipal employee" unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be "municipal employees" and shall be subject to all the provisions of this chapter with respect thereto without exception. G.L. c. 268A, §1(n).

<sup>5/</sup>"Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

<sup>6/</sup>"Official responsibility," the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

<sup>7/</sup>G.L. c. 40A, §12 provides, in relevant part:

if provision for associate members has been made the chairman of the board may designate any such associate member to sit on the board in case of absence, inability to act or conflict of interest on the part of any member thereof, or in the event of a vacancy on the board until said vacancy is filled in the manner provided in this section.

<sup>8/</sup>We compare alternate Board member status to that of a president of the board of aldermen or common council who, under G.L. c. 39, §5, may be called upon to exercise the powers of a mayor because of the mayor's death, resignation, absence or inability to serve. Merely because the mayor's powers may later "devolve" upon the official as acting mayor does not mean that he has had official responsibility for all matters pending in the mayor's office even on those days when he is not acting mayor.

We also compare this status to some private attorneys hired by a public entity to provide legal services. Not all of the legal matters arising in the agency automatically fall within the attorney's official responsibility. Rather, only those matters which are specifically referred to the attorney would fall under his or her official responsibility. Cf. *EC-COI-85-50* (city charter explicitly gave official responsibility to city solicitor for matters not ordinarily handled by him); see also *EC-COI-87-17*. Further, in responding to requests for proposals for law services, law firms regularly limit the scope of their official responsibility by contract in order to clarify that they have no authority over other matters which may arise in the agency. We find those arrangements comparable to the present situation.

<sup>9/</sup>We emphasize, however, that nothing in this opinion, or §17, should be construed as permitting **regular** Board members to act as an agent or attorney for, or to receive compensation from, anyone other than Yarmouth in connection with any particular matter (including appearing before his own board) (a) in which he has at any time participated as a municipal employee, or (b) which is, or within one year has been, the subject of his official responsibility, or (c) which is pending in the Board, except as provided by law for the proper discharge of his official duties. See, e.g., *EC-COI-92-1*; *92-10*; *Commission Advisory No. 13* (Agency).

<sup>10</sup>Section 23(b)(2) prohibits a municipal employee from using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value (\$50 or more) and which are not properly available to similarly situated individuals.

<sup>11</sup>Section 23(b)(3) provides that a municipal employee shall not act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.